Supreme Court, U.S.
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NO. 92-229

In the Supreme Court of the United States

OCTOBER TERM, 1992

CLARA COOLEY,
Petitioner,

V.

HECTOR SANCHEZ, SR., RICARDO SANCHEZ, MARIA DEJESUS SANCHEZ, MATTEL, INC., AND OGILVY & MATHER,
Respondents.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the settlement reached by plaintiff and defendants (respondents herein) in the underlying suit and the judgement entered pursuant thereto renders Mrs. Cooley's appeal to the Fifth Circuit and her petition for certiorari moot.

Whether a federal district judge has the authority to approve the settlement of the claim of a minor in a suit pending in his court and over which he has jurisdiction.

Whether a federal district judge may, under the All Writs Act, remove to his court a state quardianship proceeding which has ceased to have any reason for being but which precludes conclusion of the federally approved settlement of a case pending in the federal court on behalf of a minor and which poses a threat to dissipate the proceeds of the settlement enuring to the benefit of the minor.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

The statement of the case presented by petitioner is so selective and omits so many steps in the development of the controversy before the Court as to be misleading. Accordingly, respondents present a detailed statement of the case in an attempt to clarify the specific issues presented by this controversy.

I. Summary of Facts Underlying Original Action

This controversy arises out of a tort action in which damages for personal injuries were sought on behalf of a minor, Ricardo Sanchez ("Ricky"), by his representative and mother, Maria deJesus Sanchez ("Mrs. Sanchez")[1]. Suit was initially brought against Mattel, Inc., manufacturer of a toy involved in Ricky's accident. By amended petition, Ogilvy & Mather, an advertising agency which prepared television commercials for Mattel, was added as a defendant.

Ricky was seriously burned on December 4, 1987. He claims that a few days before he had seen a television commercial prepared by Ogilvy to advertise "Hot Wheels" toy cars manufactured by Mattel. The portion of the commercial complained of was a fantasy introduction to a number of commercials in which, in a totally animanted limbo setting, molten iron is poured from a steel ladle to form a Hot Wheels car. Hot Wheels are made of metal, not plastic. In some of these commercials, the words "born in fire, formed in flames" are spoken on the sound track. The animated car then moves off into the distance. The entire introductory sequence lasts between three and four seconds.

Ricky claims he was attempting to emulate the commercial when he tried to set fire to one of his Hot Wheels cars. The match he was using, which had been given to him

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[1] Hector Sanchez, who was married to Maria Sanchez at the time the action was filed in state court, originally appeared on behalf of Ricky. However, during the proceedings, Mr. and Mrs. Sanchez were judicially separated and Ricky's custody was awarded to Mrs. Sanchez, who was qualified as his natural tutrix by the 38th Judicial District Court for Cameron Parish, Louisiana, on March 10, 1990. Mrs. Sanchez was then recognized by order of the United States District Court for the Western District of Louisiana as the proper party to pursue the action on Ricky's behalf.

by an adult aunt, ignited some grass in the vicinity, but did not produce the effect he wanted. He, therefore, obtained an almost empty gasoline can, held it over the Hot Wheels car, and shook it in an effort to get liquid out. As a result, Ricky was engulfed in a vapor cloud which was apparently ignited by the fire from the matches he had previously struck. He received serious injuries. The incident was witnessed by Ricky's 12-year old aunt, Anna, who had told him "Don't do that. It'll explode."

Following the accident, Ricky was transported to the Shriner's Burn Center in Galveston, Texas, where he has received periodic treatment since that time. The Sanchez family continued to reside in Cameron Prish, Louisiana, at the time suit was filed, and for some time thereafter.

II. Course of Proceedings

Suit was originally filed in the 38th Judicial District Court for the Parish of Cameron, State of Louisiana. Mattel removed it to the United States District Court for the Western District of Louisiana, Judge Donald E. Walter presiding. By supplemental and amending petition, Ogilvy & Mather was added as an additional defendant.

Defendants filed a motion for summary judgment asking the trial judge to dismiss the suit with prejudice. They argued and cited numerous authorities for the proposition that the claims asserted in the lawsuit were not actionable under the duty/risk analysis employed by Louisiana tort law. Defendants also demonstrated that the commercial was protected speech pursuant to the First Amendment to the United States Constitution.

Although the motion was seriously considered by Judge Walter (and caused grave concern to counsel for

plaintiffs), it was eventually denied.[2] Defendants moved for a new trial and for certain other alternative relief. This motion was also denied.

Now faced with the certainty of a trial on the merits of a case involving very serious quantum exposure and the possibility, however small, of producting "new law" which would be harmful to defendants' industries, a decision was made by defendants to try to settle the case. A third and not insubstantial factor in that decision was honest compassion by representatives of defendants for this terribly injured child, notwithstanding their firm belief that those injuries did not result from any legal or moral fault on their part. In May of 1990, a settlement was negotiated between defendants and counsel for plaintiffs on the basis of a structured settlement having a cost of $750,000.

Prior to the settlement, Mrs. Sanchez and her children, including Ricky, had moved from Cameron, Louisiana, to Galveston, Texas, in order to be near the Shriner's Burn center where Ricky continued to receive treatment.

Having agreed to pay three quarters of a million dollars in settlement of what objectively was a "no liability" case, it was inconceivable to defendants that anyone having the slightest concern for Ricky's best interests

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[2] In a subsequent settlement hearing, Judge Walter revealed his evaluation of defendants' contentions when he advised Mrs. Sanchez:

> Mrs. Sanchez, no amount of money could ever compensate for Ricky's tragic injuries. If liability were clear, certain, this would not be anywhere near enough money. The problem is that liability, in my opinion, is problematical. It may be that the law would ultimately favor you on appeal. But it's going to take a new theory or recognizable cause of action.

would fail to approve the proposed settlement.[3] Thus, there was no reason not to seek approval from every tribunal having any colorable claim to jurisdiction over the minor. Accordingly, it was decided to first seek approval of the settlement from the probate court having jurisdiction over the minor's current residence in Galveston County, Texas, then to seek approval from the 38th Judicial District Court of the State of Louisiana for the Parish of Cameron, which had qualified Mrs. Sanchez as natural tutrix of Ricky in a tutorship proceeding which remained open in that Court, and finally to obtain the approval of the federal district court in which the tort suit was pending by presentation of a final order of dismissal based upon the settlement. Defendants and Mrs. Sanchez proceeded accordingly.

Texas counsel was employed at the expense of defendants to represent Mrs. Sanchez in obtaining approval of the settlement by the appropriate Texas court, and on June 7, 1990, proceedings were instituted in the Probate and County Court of Galveston County, Texas. Problems began to develop almost from the beginning. First, the judge of the Galveston Country Probate Court to which the matter was assigned, Judge Jerome Jones, conditioned appointment of Mrs. Sanchez as guardian of her minor child on posting a bond in an amount for which she obviously could not qualify. It was suggested that under these circumstances it was customary to appoint an employee of

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[3] Judge Walter apparently shares the same view. In commenting on the possibility that his approval of the settlement would be appealed, he observed:

> It would be incomprehensible to me that anybody would reverse the approval of the settlement.

It should also be noted that Mrs. Cooley did not appeal Judge Walter's finding, in approving the settlement, that it was in Ricky's best interest.

the Texas Welfare Department to act as guardian, which was only a formality. Accordingly, Judge Jones appointed Mrs. Cooley, petitioner herein, as guardian.

Judge Jones held hearings on July 3, 1990 and October 23, 1990 to consider the settlement reached in May, 1990. However, he did not act on the application for approval of the settlement. Moreover, the focus of the October 23, 1990 hearing seemed to be, incredibly, on the effect the settlement would have on welfare benefits payable to Mrs. Sanchez's family as a unit, rather than on the very substantial amounts of money which would be paid to Ricky over his lifetime in lieu of being dependent upon welfare and charity.

On December 13, 1990, Judge Jones wrote a letter to Texas counsel representing Mrs. Sanchez, stating that the proposed settlement was not before the court, since the application for approval was filed on behalf of Mrs. Sanchez, and not by Mrs. Cooley. This position of Judge Jones indicated to respondents that the Texas proceeding had been a waste of time and that there was no point in pursuing it further. Accordingly, the original plan for obtaining multiple approvals of the settlement was abandoned and it was decided to go directly to the federal district court and ask that court to exercise its inherent power to approve settlement of a minor's tort suit pending before it.

On January 17, 1991, defendants joined Mrs. Sanchez in filing a joint petition in the federal district court setting forth the background discussed above and asking Judge Walter to approve the proposed settlement. Incorporated in that joint petition was a third-party demand by defendants against Mrs. Cooley and Robert V. Shattuck, a Galveston attorney who had been appointed attorney *ad litem* for the minor by the probate court, and an action to

quiet title by Mrs. Sanchez against Mrs. Cooley and Mr. Shattuck. Both pleadings sought to have Mrs. Cooley and Mr. Shattuck assert any positions they might have concerning the minor's claim and the settlement.

After the filing of this joint petition, Judge Jones suddenly decided that the application of Mrs. Sanchez was before him and, by order of February 5, 1991, he denied the application to settle and enjoined plaintiffs, defendants and their attorneys from entering into a settlement. An appeal from Judge Jones' injunction was taken, but was dismissed as moot on October 3, 1991 because of the events set forth below.

On February 18, 1991, the federal district court held an informal hearing on the joint petition. Following an unsuccessful effort by Judge Walter to avoid a conflict with the Texas probate court during the course of which Judge Jones advised that he preferred to allow the minor to "roll the dice," Judge Walter issued an order on March 8, 1991, ruling that he, as the federal district judge of the court in which the minor's tort suit was pending, had authority to consider and approve a settlement of the claim of the minor, and that the Texas probate court had no authority to interfere with his exercise of that jurisdiction by enjoining the parties or their attorneys. He further ordered plaintiffs and defendants to appear in his court on Monday, April 8, 1991, for a hearing to determine whether the settlement should be approved. The order further stated that the only property owned by the minor plaintiff was his interest in the lawsuit pending in federal district court and that the Texas guardians had no authority to act or deal with said property. Judge Walter then dismissed the third-party demands against the Texas guardian and stated that she need not appear at the April 8 hearing. Finally, Judge Walter enjoined the Texas probate court, Judge Jones,

Mrs. Cooley and Mr. Shattuck from interfering with the hearing scheduled for April 8, 1991.

Thereafter, Judge Jones granted Mrs. Cooley authority to employ the law firms of Jamail & Kolius of Houston, Texas, and Greer, Herz & Adams of Galveston, Texas, to represent her and the minor's estate. On April 5, 1991, Judge Jones also issued an order dissolving his earlier injunction of the parties from entering any settlement without his authority, in which he reaffirmed his position that the parties could not settle without his authority and that the proposed settlement was inadequate. Mrs. Cooley then wrote a letter to the parties stating that only she and her attorneys had authority to settle Ricky's claims.

Judge Jones also sought reversal of Judge Walter's order of March 8 by a writ application to the Fifth Circuit Court of Appeal, which was denied on April 2, 1991, and by an appeal to the Fifth Circuit, which was dismissed on June 5, 1991.

In the meantime, the hearing scheduled for April 8, 1991, was held. Judge Walter elicited detailed testimony in order to make a determination that the proposed settlement, which was actually more favorable than that initially considered by Judge Jones, was in the best interest of the minor. The monthly annuity had been increased by $500.00 per month during Ricky's minority and, at Judge Walter's suggestion, counsel for Mrs. Sanchez agreed to a substantial reduction of her fees and a waiver of expenses. Based upon his determination of the facts in the April 8, 1991 hearing, Judge Walter approved the proposed settlement. No appeal or writ application was taken from Judge Walter's approval of this settlement.

Judge Walter conditioned his April 8 approval of the settlement upon the minor's estate being protected from costs in connection with the probate proceeding in Texas. In an attempt to satisfy that condition, counsel for defendants communicated in writing on several occasions with attorneys involved in the Galveston probate proceeding, seeking a statement as to whether the federal district court's approval of the settlement would be honored and of the attorneys' fees and expenses properly due and taxable as costs. These written requests brought forth only one response. By letter of June 11, 1991, Mr. Shattuck advised that he would "be willing to accept $29,000 as the *ad litem* fee for services and expenses to date . . ." Other Galveston counsel did not respond to defendants' requests. Being thus stymied in their efforts to satisfy the condition imposed by judge Walter and faced with a Texas judge essentially advising that the settlement would be null and void and thus ignored even if approved by Judge Walter, on June 20, 1991, defendants joined with Mrs. Sanchez in filing an *ex parte* motion to remove the probate proceeding pursuant to the All Writs Act. This motion was granted by order of the court on June 21, 1991.

After motions to remand filed by Mrs. Cooley and Mr. Shattuck were denied by Judge Walter, a stipulation was entered between defendants and the Texas appointees and attorneys that the total fees for services rendered and expenses incurred through August 13, 1991, taxable as costs to the probate proceeding, were as follows:

Mrs. Clara Cooley	-	$ 1,268.25
Mr. Robert V. Shattuck, Jr.	-	13,979.91
Greer, Herz & Adams	-	-0-
Jamail & Kolius	-	-0-

The stipulation was filed at a hearing held by Judge Walter on August 13, 1991. It was explained to the court that the attorneys for Mrs. Cooley had stipulated the zero fee because their compensation was to be on a contingency basis.

At the hearing on August 13, Judge Walter entered a final judgment in which he dismissed the motions to remand, fixed the fees of the Texas appointees and their attorneys as set forth in the stipulation, and made the terms of the settlement agreement which had been approved at the April 8, 1991 hearing, the judgment of the court. The judgment also suspended all payments called for thereunder pending any appeal of the judgment, except for the sum of $35,730 which was to be paid immediately in order to take care of the needs of the minor during any appeal. Mrs. Cooley (petitioner herein) then took an appeal to the Fifth Circuit complaining only of the removal of the guardianship proceeding and making no complaint concerning the approval of the settlement by Judge Walter.

The panel of the Fifth Circuit which heard the arguments on the appeal on May 5, 1992, were as incensed as respondents herein at the actions of Judge Jerome Jones of the Texas Probate Court and the defense thereof made by Mrs. Cooley and the attorney she employed on a contingency fee contract pursuant to Judge Jones' specific authorization. In less than twenty-four hours after hearing the arguments, the Fifth Circuit sustained the judgment of the federal district court in all respects, stating that the "action by the state court was a specific and direct intrusion into the appropriate disposition of this matter by the federal district court, fully justifying its use of the authori-

ty granted by the All Writs Act."[4] Petitioner now seeks writs from the Fifth Circuit's affirmation of the federal district court's actions.

SUMMARY OF ARGUMENT

Approval by U. S. District Court Judge Walter of the settlement of the underlying tort suit reached between defendants and the minor, duly represented by his mother, renders this petition for writ of certiorari moot. The *res judicata* effects of the consent judgment approving the settlement, which has not been appealed, precludes relitigation of those issues intended to be fully resolved, liability and damages. Accoridingly, the issues raised in petitioner's writ of certiorari are moot and of academic interest only.

Moreover, removal of the Texas probate proceeding pursuant to the All Writs Act is supported by the extraordinary circumstances which existed and jurisprudence interpreting that Act. The federal district court, having approved settlement of the minor's claim pending before it as a fair and equitable resolution of a questionable cause of action, was genuinely concerned with the distinct possibility of the settlement funds being drained away by court costs in the Texas probate proceedings. Additionally, by refusing to cooperate with the federal district court and respondents in their attempts to bring this matter to a conclusion, and insisting that the federal district court had no authority to approve the settlement, those involved in the

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[4] The Fifth Circuit did not even perceive the issue to be a close one, refusing to publish its opinion, per Local Rule 47.5, which provides:

> The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession.

probate proceeding were interfering with the federal district court's exercise of its diversity jurisdiction and authority to approve the settlement, necessitating removal of the Texas proceedings under the All Writs Act. The Fifth Circuit Court of Appeals' affirmation of the district court's actions was eminently appropriate and the petition for writ of certiorari should be denied.

Petitioner misinterprets and/or misapplies the law. The "probate exception" to federal jurisdiction is inapplicable to the approval of a minor's settlement by a federal court. Even if the exception were applicable, the district court had diversity jurisdiction over the tort action and thus the independent authority to act in the minor's best interests as well as to protect its jurisdiction pursuant to the All Writs Act.

Alternative arguments raised by petitioner, that the All Writs Act cannot be used to usurp a state official's power, and that a case on appeal cannot be removed, are also without merit. The cases cited in support of the first argument involve the invocation of federal jurisdiction *solely* to compel state officers to act in a ceratain way. The cases cited in support of the second argument are inapplicable because removal in those cases was pursuant to the removal statutes, not the All Writs Act, as in the present case.

Petitioner's suggestion of an alternative solution to the removal, jury trial of the underlying matter, is not a "viable, alternative remedy," as a likely result if the case were tried would be a verdict in favor of defendants. Her arguments objecting to the lack of adherence to proper procedural requirements of the removal statutes are equally without merit. The Texas probate proceeding was removed pursuant to the All Writs Act, whose procedural re-

quirements are different than the requirements of the removal statutes.

REASONS FOR DENYING WRIT OF CERTIORARI

The District Court decision as affirmed by the United States Court of Appeals for the Fifth Circuit does not raise issues of a character which fulfill the requirements of Rule 10, Rules of the Supreme Court of the United States. As noted by the Fifth Circuit, the issues raised by petitioner were decided in respondents' favor on the basis of well-settled principles of law.

I. Respondents Urge Denial of Certiorari on the Ground that Approval by the District Court Judge of the Settlement Renders Petitioner's Writ of Certiorari Moot and of Academic Interest Only

Mrs. Cooley's argument that the probate proceeding was improvidently removed is premised on the erroneous assumption and inference that the federal district court was without independent jurisdiction or authority to approve the settlement of Ricky's claim. Because the district court had jurisdiction and authority to recognize Mrs. Sanchez as Ricky's representative, and to approve the settlement agreement, the binding, preclusive effect of the consent judgment renders moot the collateral issues of the correctness of the district court action in removing and refusing to remand the Texas probate proceedings and removing appellant as guardian of the minor.

The district court had authority, pursuant to FRCP 17(c), to recognize or appoint Mrs. Sanchez as Ricky's

representative in the case pending before it.[5] Rule 17(c) also gives the district court authority to "make such other order as it deems proper for the protection of the infant or incompetent person." The authority to recognize or appoint a representative, thus, also encompasses the authority to authorize and approve actions by the representative, including settlements. *See Insurance Co. v. Bangs,* 103 U.S. 435, 13 Otto 435, 26 L.Ed. 580 (1880); *Thompson v. Maxwell Land-Grant and Railway Co.,* 168 U.S. 451, 18 S.Ct. 121, 42 L.Ed. 539 (1897); *Decanay v. Mendoza,* 573 F.2d 1075 (9th Cir. 1978); *Glover v. Bradley,* 233 F. 721 (4th Cir. 1916); *Carter Coal Co. v. Litz,* 54 F.Supp. 115 (W.D. Va. 1943), *aff'd,* 140 F.2d 934 (4th Cir. 1944).

In summary, a federal district court which is authorized and compelled to look after the interests of minor plaintiffs before it also has the power and authority to approve settlements entered into on behalf of those minors. To hold otherwise, as suggested by petitioner, would result in the necessity of trying every case involving a minor, a consequence antithetical to the recognized precept that settlements are a favored way of resolving legal disputes. *Bergh v. Department of Transportation,* 794 F.2d 1575, 1577 (Fed. Cir.), *cert. denied,* 479 U.S. 950, 107 S.Ct. 437, 93 L.Ed. 2d 386 (1986). At the hearing held on April 8, 1991, Judge Walter fulfilled all of the procedural rquirements to ensure that Ricky's interests were pro-

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[5] (c) Infants or Incompetent Persons. Whenever an infant or incompetent person has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. An infant or incompetent person who does not have a duly appointed representative may sue by next friend or by a guardian *ad litem.* The court shall appoint a guardian *ad litem* for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person. FRCP Rule 17(c).

tected and the settlement was fair by making independent inquiry into the question of whether the proposed settlement was in the best interest of the minor. The approved settlement which was made the judgment of the federal district court, precludes any further litigation concerning defendants' liability to Mrs. Sanchez, and their minor son, Ricky. Therefore, this Court should deny Mrs. Cooley's petition as being moot.

II. The District Court Properly Removed the Texas Probate Proceeding Pursuant to the All Writs Act and the Fifth Circuit Properly Affirmed

Petitioner's argument objecting to the removal of the Texas probate proceeding erroneously assumes that there were not and could not be procedings in the federal district court to approve the settlement negotiated between plaintiffs and defendants until the Texas probate proceeding was removed in July of 1991, and that Judge Walter's approval of the settlement was "in" the probate proceeding. This error is reflected by the gaping omissions in Mrs. Cooley's outline of the proceedings below. Mrs. Cooley's argument also incorrectly suggests that the settlement could only be approved by the Texas probate court and the federal district court had no authority to approve the settlement.

The removal, which is all Mrs. Cooley really complains of, came months after the federal district court approved the settlement, and was prompted by the failure of Mrs. Cooley and her attorneys to cooperate with defendants in satisfying the condition imposed by Judge Walter. In view of the history of the Texas probate proceedings between June 1990 and June 1991, Judge Walter was legitimately concerned that, although the settlement was manifestly in the best interests of the minor, it might not

be concluded or the proceeds thereof might be hemorrhaged away in the Texas probate proceedings, considering the course that the Texas probate judge, his appointees and their attorneys seemed to be head-set on pursuing. As shown by their actions subsequent to removal in stipulating and paying the fees and expenses of the Texas appointees, defendants have at all time been more than willing to pay the fair expenses incurred in the probate proceedings and to do what was necessary in order to conclude it.

Mrs. Cooley has acknowledged that the only purpose of the Texas probate proceeding was to obtain approval of the settlement entered on Ricky's behalf. Because that approval was validly obtained from the federal district court on April 8, 1991, there was no longer any reason for the continued existence of the Texas probate proceeding. By refusing to cooperate with defendants in their effort to conclude the probate proceedings, Mrs. Cooley and her attorneys were interfering with the federal district court's exercise of its jurisdiction.

There is no clearer example of a situation calling for use of the All Writs Act. In the extraordinary circumstances facing the parties and the federal district court, Judge Walter clearly had the authority to remove the Galveston probate proceedings to his jurisdiction so that this litigation could be concluded. The All Writs Act, 28 U.S.C. § 1651(a), provides:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdiction and agreeable to the usages and principles of law.

This Act

> authorizes a Federal Court in exceptional circumstances to issue such orders to persons "who, though not parties to the original action or engaged in wrong doing, are *in a position to frustrate* the implementation of a court order or the proper administration of justice, and encompasses even those who have not taken any affirmative action to hinder justice."

Yonkers Racing Corp. v. City of Yonkers, 858 F.2d 855 (2d Cir. 1988), *cert. denied*, 489 U.S. 1077, 109 S.Ct. 1527, 103 L.Ed.2d 833 (1989), quoting *United States v. New York Telephone Co.*, 434 U.S. 159, 98 S.Ct. 364, 54 L.Ed.2d 376 (1977) (Emphasis supplied by *Yonkers* court).

In the *Yonkers* case, the Second Circuit Court of Appeals held that the following underlying circumstances supported removal of a state court proceeding to federal district court: (1) traditional statutory removal procedures were inadequate, (2) there was a need to vindicate constitutional rights, and (3) a possibility existed that inconsistent orders would be entered by the state and federal courts. These circumstances justified exercise of

> the power of a federal court to issue such commands under the All Writs Act as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise attained.

Yonkers Racing Corp. v. City of Yonkers, 858 F.2d at 863.

The circumstances in the instant case were equally as exceptional as those which existed in *Yonkers*.

Statutory removal procedures were not available because there was no defendant in the Galveston guardianship proceeding and the statute would not permit removal to the federal district court in which the underlying tort action was pending. *See* 28 U.S.C. § 1441(a). Secondly, although there was no constitutional right at issue, there were equally compelling considerations. Among them were the best interests of the minor over whose claim the federal district court had properly obtained jurisdiction and the finding of that court that those interests were best served by the settlement agreement which had been reached. That protection of settlement negotiations and agreements with respect to federal suits is a proper consideration is established by the case *In re Baldwin-United Corp.*, 770 F.2d 328 (2d Cir. 1985).

A final extraordinary circumstance was the distinct probability, as evidenced by prior action or inaction in the Galveston probate proceeding, that orders inconsistent with the federal district court's finding with respect to the settlement agreement would be issued if the parties were to make any attempt to proceed further in that forum. This probability is an extraordinary circumstance which is sufficient in itself to justify an All Writs order. *United States v. International Brotherhood of Teamsters*, 907 F.2d 277 (2d Cir. 1990).

Petitioner attempts to distinguish *Yonkers* by arguing that in *Yonkers*, the All Writs Act was implemented only after the federal district court issued an order which would be frustrated by the state court action. However, rather than drawing a distinction between *Yonkers* and the present case, petitioner merely magnifies the need for the federal district court's actions in the present case pursuant to the All Writs Act. Indeed, the previous actions of the Texas probate court indicated that the federal district

court's authority to approve the settlement, which it had already done in principle, would be frustrated by the Texas court's insistence that it was the only court that could approve the settlement and by all indications would refuse to honor any settlement approved by the federal district court. The timing of the actual order approving this settlement is immaterial because the action taken by the federal court pursuant to the All Writs Act was clearly necessary in aid of its jurisdiction and agreeable to the usages and principles of law.

In summary, extraordinary circumstances existed in this matter. The interests involved — those of the minor and the federal district court's finding in that regard — were substantial, could not be vindicated, and in fact were being frustrated by action or inaction in connection with the Galveston probate proceeding. That action or inaction had prevented the parties from effectuating the settlement agreement for over a year and continues even to the present — twenty seven months after the settlement was reached. An additional interest to be considered was that of judicial economy which was not being served when findings of the federal district court in the exercise of its proper jurisdiction could not be carried out either because of stubborn adherence to a contrary opinion by those involved in the Galveston probate proceedings or a refusal on their part to cooperate in effectuating the federal district court's findings.

Once the probate proceeding was removed, the problem raised by possible court costs was settled by stipulation, and all stipulated taxable costs have been paid by defendants pursuant to Judge Walter's order. The impediments having been removed, Judge Walter was then able to incorporate the terms of the settlement which he had approved under his inherent power long before the

removal into the final judgment of August 15, 1991.

It is unfortunate that the federal district court eventually had to resort to the All Writs Act in order to prevent the continued interference with its jurisdiction, but that is something of which Mrs. Cooley cannot complain since it is she and her attorneys who forced that action by their obstinacy.

III. Response to Issues Raised by Petitioner

A. The "probate exception" to a federal court's jurisdiction is not applicable in this case and, even if it were, the federal court already had diversity jurisdiction over the tort suit and its jurisdiction over the Texas probate proceeding is ancillary pursuant to the All Writs Act.

Petitioner asserts that federal courts have no jurisdiction over state probate procedings and cannot seize or control the property in a probate court's possession.[6] In addition to the fact that Ricky's property — his tort claim — was never in the possession of the probate court, the statement that federal courts have no probate jurisdiction is much too broad. 18 Wright, Miller & Cooper, *Federal Procedure and Practice: Jurisdiction*, § 3610, p. 481-82. The "probate exception" to the federal courts' general jurisdiction, which as a judicial creation must be narrowly construed, *Georges v. Glick*, 856 F.2d 971 (7th Cir. 1988),

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[6] Interestingly, in *Ankenbrandt v. Richards*, 117 S.Ct. 2206, 119 L.Ed. 2d 468, 60 U.S.L.W. 4532 (1992), this court concluded that the so called "domestic relations exception" to a federal court's jurisdiction, which is similar to the probate exception espoused by petitioner, is only applicable to "cases involving the issuance of a divorce. alimony, or child custody decree." 112 S.Ct. at 2215. The probate exception should likewise be narrowly construed only to include the probate of a will or administration of a decedent's estate.

generally refers to the probate of a will or the administration of an estate. 18 Wright, Miller & Cooper, § 3610, and cases cited therein.

The case law supports respondents' position that this "probate exception" is applicable only to the probate of a will or administration of a decedent's estate, and not to other matters within "probate" jurisdiction. For instance, in *Ashton v. Josephine Bay & C. Michael Paul Foundation*, 918 F.2d 1065, 1072 (2d Cir. 1990), the court noted that the "probate exception does not prevent a federal court from adjudicating the rights to property in an estate." In addition, in *Georges, supra*, the court held that the probate exception does not prohibit an action for legal malpractice, breach of contract, breach of fiduciary duty, and interference with trust inheritance against an attorney who prepared an amendment to a trust. The probate exception was held inapplicable because the case did not involve the actual probate of a will or directly affect the probate *res*. Thus, petitioner is simply incorrect in arguing that the "probate exception" mandates that only a state probate court has authority to approve a minor's settlement as a federal district court clearly has this authority.

However, assuming for argument that Mrs. Cooley is correct that the district court has no general jurisidiction over the "probate" proceeding, this alone does not prohibit the district court's assumption of ancillary jurisdiction pursuant to the All Writs Act. Although it is correct that the All Writs Act cannot be used to invoke jurisdiction, it can be used to protect jurisdiction previously acquired on an independent ground. *Brittingham v. United States Commissioner of Internal Revenue*, 451 F.2d 315, 317 (5th Cir. 1971). In the present case, the district court clearly had diversity jurisdiction over the Sanchez lawsuit, a fact which is not disputed or contested by petitioner. The All

Writs Act was used not to impermissibly usurp the power of the Texas probate court, as suggested by Mrs. Cooley, but rather to protect a federal court's own jurisdiction and authority to approve the settlement of a case before it — authority the probate court was attempting to usurp.

B. Petitioner is in error in asserting that the All Writs removal was an attempt to usurp a state official's discretion.

Petitioner next argues that the All Writs Act does not give federal courts authority to usurp a state official's discretion. However, the cases cited by appellant in support of this argument, *Russell v. Knight*, 488 F.2d 96 (5th Cir. 1973), and *United States ex rel. Chapman v. Supreme Court of Pennsylvania*, 151 F.Supp. 681 (W.D.Pa. 1957), are inapplicable. In these cases, as pointed out by petitioner, the respective courts held only that a federal court cannot use a *writ of mandamus* to compel a state officer to act in a certain way. In both cases, the jurisdiction of the federal court was invoked solely to attempt to have the state officers act in a certain way. In the present case, on the other hand, the All Writs removal did not compel Judge Jones to act in a certain way, but merely precluded him from acting in a way that would interfere with the federal court's jurisdiction over a case that was properly before it.

C. The All Writs Act does not prohibit removing a state court proceeding in which an appeal is pending.

Petitioner next states that a federal court has no jurisdictioin to remove a case in which an appeal is pending. However, in the cases cited, *Lowe v. Williams*, 94 U.S. 650, 4 Otto 650, 24 L.Ed. 216 (1876); *Stephenson v. Williams*, 86 U.S. 572, 19 Wall 572, 22 L.Ed. 162 (1873);

and *Katz v. Herschel Manufacturing Co.*, 150 F. 684 (C.C.Neb. 1906), removal was attempted pursuant to a removal statute, not the All Writs Act. In fact, the removal statute in the cited cases stated specifically that the application for removal must be made "before the final hearing or trial of this suit." *Lowe*, 94 U.S. at 651; *Stephenson*, 86 U.S. at 574; *Katz*, 150 F. at 685. The distinction between those cases and the present is obvious; a party to an action lodged in state court at some point will waive whatever right he has under statute to remove the action to federal court if he does not timely do so. Removal pursuant to the All Writs Act, on the other hand, is not so much concerned with the rights of the parties as with protecting the jurisdiction of the court. To place an artificial time barrier on the federal court, as sugested by Mrs. Cooley, would render the All Writs Act useless and subject a federal district court at least to the whims of a state appellate court. Further, Mrs. Cooley cites no authority to support her argument that a case on appeal cannot be removed pursuant to the All Writs Act.

D. The alternative remedy suggested by Mrs. Cooley, to allow the minor to "roll the dice" in lieu of the settlement, is clearly not a viable or favorable remedy.

Petitioner argues that the All Writs removal was erroneous because the parties had an alternative remedy to resolve the tort case. Specifically, she suggests that the federal district court should have adhered to the wishes of the Texas probate judge and tried the case by jury. Underlying this argument is petitioner's acknowledgment that the Texas probate court would be bound by the result if the case were tried. Equally true, but ignored by petitioner, is that the Texas probate court, and any other court for that matter, is also bound by the compromise settle-

ment, as discussed previously. Having agreed that the settlement is fair to all parties involved, Judge Walter properly invoked the All Writs Act to protect his authority and jurisdiction and ensure that the Texas probate court would not interfere with disbursement of the settlement funds and conclusion of the pending case. Additionally, to "roll the dice" and try the case, as suggested by Judge Jones and Mrs. Cooley, is clearly not a viable or favorable alternative remedy when the interests of a minor are involved.

Mrs. Cooley also argues that the appellees have impermissibly sought to have Judge Walter substitute his judgment for Judge Jones' judgment relative to the fairness of the settlement. This argument suggests that Judge Walter had no jurisdiction to approve the settlement, a suggestion previously established to be without merit. In addition, and more importantly, it would seem that Judge Walter, who as trial judge was familiar with both the underlying facts giving rise to this action and Louisiana law which would be applied to the case, would be in the best position to determine whether the settlement was fair and in Ricky's best interest.

E. Mrs. Cooley's argument that the removal was improper because the parties did not comply with the federal removal statutes and had no standing to seek removal is erroneous because the removal was pursuant to the All Writs Act.

Appellant argues that in removing the Texas probate court proceeding, appellees failed to comply with the requirements of 28 U.S.C. § 1441,[7] the removal statute. This

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[7] Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending....28 U.S.C. §1441(a).

argument is clearly without merit as the Texas action was not removed by the defendants pursuant to the removal statute, but by the federal district court pursuant to the All Writs Act. Such a removal has been approved in *Yonkers, supra,* and *Nowling v. Aero Services International, Inc.,* 734 F.Supp. 733 (E.D.La. 1990). Contrary to the requirements to be followed in removing a case pursuant to 28 U.S.C. § 1441, due process reqirements are fulfilled under the All Writs Act if the affected parties have actual notice and opportunity to seek relief in district court. *In re Baldwin-United Corporation,* 770 F.2d 328, 340 (2nd Cir. 1985); *United States v. Hall,* 472 F.2d 261, 266-67 (5th Cir. 1972). Petitioner does not argue that she did not receive notice of the removal nor the opportunity to seek relief in district court. In fact, she sought a remand. Nor can she argue that Judge Walter, as a federal district court judge sitting in Louisiana, cannot remove a case pending in another state pursuant to the All Writs Act as the power of a district court pursuant to the All Writs Act extends beyond a state's territorial limits. *Carbo v. United States,* 277 F.2d 433 (9th Cir. 1960), *aff'd,* 364 U.S. 611, 81 S.Ct. 338, 5 L.Ed. 2d 329 (1961).

Petitioner attempts to distinguish the present case from the *Yonkers* case. Specifically, appellant argues that in *Yonkers,* the City had standing under the removal statutes to remove and that *Yonkers* does not indicate that the All Writs Act takes priority over the procedural requirements of federal removal statutes. However, this is clearly a misstatement of *Yonkers,* inasmuch as the "inadequacy" of the removal statute was one of the extraordinary circumstances which justified resort to the All Writs Act. In *Yonkers,* as in the present case, the state court actions were removed to the federal district court pursuant to authority granted by the All Writs Act, not pursuant to the removal statutes.

Appellant's next assertion, that the All Writs Act does not circumvent the procedural requirements of the removal statutes, is equally without basis. Appellant cites no jurisprudence for this statement, and, to the contrary, the jurisprudence clearly indicates that removal pursuant to the removal statute and removal pursuant to the All Writs Act are completely different procedural devices.

CONCLUSION

Respondents submit that the issues raised by petitioner are moot and the petition should be dismissed for that reason.

Moreover, respondents submit the district court did not err in removing the Texas quardianship proceedings under the All Writs Act and the Fifth Circuit properly affirmed. Uncontested diversity jurisdiction over the tort claim of a minor empowered the court to appoint the minor's natural mother as his federal representative and to authorize and approve her settlement of her son's claims based upon an uncontested finding that the $750,000.00 settlement, which makes lifetime benefits available to the minor, was in his best interests. Consequently, the action or inaction of the state probate court and its appointees, which precluded conclusion of the settlement, presented extraordinary circumstances which justified resort by the federal district court to All Writs power. Its exercise of that power to remove the impediment to its jurisdiction was proper and the Fifth Circuit properly affirmed this use of the All Writs Act based on the circumstances caused by the Texas Probate Court and its subjects. The petition for writ of certiorari is totally without merit and should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing pleading has been served upon all counsel of record by depositing same in the United States Mail, postage prepaid, this 4th day of September, 1992, at New Orleans, Louisiana.

C. Edgar Cloutier

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